

01-1081

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

JIMMY JACKSON,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS APPELLEE

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TABLE OF CONTENTS

	PAGE
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE ISSUE PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT	8
ARGUMENT:	
THE EVIDENCE WAS SUFFICIENT TO SUPPORT DEFENDANT’S CONVICTION FOR CONSPIRACY	9
CONCLUSION	17

TABLE OF AUTHORITIES

CASES:	PAGE
<i>United States v. McDermott</i> , 245 F.3d 133 (2d Cir. 2001)	<i>passim</i>
<i>United States v. Rubin</i> , 844 F.2d 979 (2d Cir. 1988)	11, 12, 14
<i>United States v. Salameh</i> , 152 F.3d 88 (2d Cir. 1998), cert. denied, 525 U.S. 1112 (1999)	10
<i>United States v. Wiley</i> , 846 F.2d 150 (2d Cir. 1988)	11, 14
 STATUTES:	
15 U.S.C. 78ff	15
15 U.S.C. 78j(b)	15
18 U.S.C. 2	1, 2
18 U.S.C. 3231	2
18 U.S.C. 371	2
18 U.S.C. 844(h)(1)	1, 2, 3
18 U.S.C. 844(i)	1, 2, 3
28 U.S.C. 1291	2
 RULES:	
Fed. R. Crim. P. 29	3

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction entered by the United States District Court for the Northern District of New York. The United States charged defendant Jackson with violating four federal criminal statutes, 18 U.S.C. 2, 18 U.S.C. 371, 18 U.S.C. 844(i), and 18 U.S.C. 844(h)(1) (App. 5).¹ The defendant was convicted

¹ Citations to “App. __” refer to pages in the Appendix bound with defendant’s opening brief. Citations to “Tr. __” refer to pages in the Trial Transcript. Citations to “R. __” refer to documents in the record by number as shown on the Index to the Record on Appeal (App. 20-33). Citations to “Def. Br. __” refer to pages in defendant’s opening brief in this Court.

on one count, for violation of 18 U.S.C. 371, and was sentenced by the district court, which entered judgment on January 22, 2001 (App. 7-14). He filed a timely notice of appeal on January 24, 2001 (App. 1). The district court had subject matter jurisdiction under 18 U.S.C. 3231. This court has appellate jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether there was sufficient evidence to support defendant's conviction.

STATEMENT OF THE CASE

On October 7, 1999, a federal grand jury indicted defendant-appellant Jimmy Jackson and two co-defendants, Joseph Brown and Henry Savage, for their participation in a conspiracy to commit arson and in the arson of the Believers Miracle Deliverance Church, at 700 Fay Street, in Utica, New York (App. 2-6). Count One alleged that, in violation of 18 U.S.C. 371, the defendants and two unindicted co-conspirators conspired to maliciously damage and destroy the church by means of fire, in violation of 18 U.S.C. 844(i). Count One further alleged that one unindicted co-conspirator recruited other members of the conspiracy to set fire to the church, and that appellant Jackson acted as a lookout while Brown, Savage, and a second unindicted co-conspirator entered the church and set fire to it (App. 3-5). Counts Two and Three alleged that all three defendants violated 18 U.S.C. 2, 18 U.S.C. 844(i) and 18 U.S.C. 844(h)(1) (App. 5-6).²

² 18 U.S.C. 844(i) makes it a federal offense to "damage[] or destroy[], or attempt[] to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real (continued...)"

Following a jury trial, Jackson was convicted of Count One, and acquitted of Counts Two and Three (App. 7, 87-88).³ As to Count One, the jury found the overt act alleged in paragraph 4(f) of the Indictment: that Savage and Brown had poured gasoline in the church and ignited it while Jackson remained outside and served as a lookout (Tr. 557; see App. 4-5). Pursuant to Rule 29, Fed. R. Crim. P., Jackson moved for a judgment of acquittal, both at the close of the government's case and following the jury's verdict, on the ground that there was insufficient evidence to support his conviction (App. 59-60, 89-99). The district court denied both motions (App. 60, R. 90). "Viewing the evidence concerning Defendant Jackson's actions in the light most favorable to the Government, the Court holds that a reasonable jury could have found that Defendant Jackson was present at the church on the night in question under circumstances that lead to the conclusion that Defendant Jackson was a member of the conspiracy to burn the church" (R. 90 at 4).

²(...continued)

or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce[.]" 18 U.S.C. 844(h)(1) prescribes an additional penalty for anyone who "uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States[.]"

³ Defendant Brown was convicted on all three Counts (App. 87-88). The United States dismissed the charges against Savage without prejudice before trial, after Denise Savage, his wife, invoked her spousal privilege not to testify against him (R. 52; see Tr. 3-17).

On January 17, 2001, Jackson was sentenced to 33 months imprisonment, 3 years supervised release, and restitution in the amount of \$149,904 (App. 8-13). On January 24, he filed a timely notice of appeal (App. 1).

STATEMENT OF FACTS

Shortly after midnight on October 20, 1997, the Believers' Miracle Deliverance Church at 700 Fay Street, Utica, New York, was destroyed by fire (Tr. 157-162, 167). Investigators at the scene found "pour patterns" and other indications that an accelerant had been poured at the three points where the fire started – the double doors leading into the sanctuary, a stairway leading up to the balcony, and on the balcony (Tr. 177-179, 181-190). Subsequent tests of debris collected from the burned church identified gasoline as the accelerant (Tr. 177-179, 181-190, 233-234).⁴

At the time of the fire, Willie Steele was the pastor of the Believers Miracle Deliverance Church (Tr. 308). For over 13 years, Pastor Steele had been the assistant pastor of St. Mark's Tabernacle, also in Utica (Tr. 308-309). The pastor of St. Mark's was Bishop Calvin Ashley (Tr. 309). In 1996, Pastor Steele and several members of the St. Mark's congregation left St. Mark's and formed their own congregation (Tr. 311, 314-316). The following year, they rented and began to renovate the church building at 700 Fay Street (Tr. 308, 321-323). Pastor Steele testified that her relationship with Bishop

⁴ Both defendants conceded at trial that the fire was the result of arson (Tr. 478, 498-499).

Ashley became strained after her departure from St. Mark's (Tr. 317-319). There was a dispute between them over the telecast of a Christmas pageant that had traditionally been performed at St. Mark's (Tr. 328-331), and Bishop Ashley accused her of embezzling \$20,000 from St. Mark's and of taking members from his church (Tr. 340, 343-344, 348-349). Pastor Steele also testified that she had preached against homosexuality (Tr. 337), and that she had counseled Jimmy Jackson and Joe Brown against homosexual behavior (Tr. 337-340, 341).

Testimony about the conspiracy and the arson was presented at trial by one of the participants, Roger Perkins. On October 19, 1997, Perkins, who was then 17 years old, had dinner with Bishop Ashley (Tr. 368). Ashley told him that the people at Believers' Miracle Deliverance Church were "wicked and that they were lesbians, and just things of that nature. * * * He was pretty upset and really stern about what he was saying" (Tr. 369). After dinner, Ashley told Perkins to drive by the church and to stop in front of it (Tr. 370). When they stopped at the church, Ashley said that it would be easy for Perkins to get inside through either the back doors or the front doors (Tr. 371). Ashley also expressed his dislike for Pastor Steele (Tr. 371-372).

At about 11:00 that same evening, Perkins testified, he encountered Henry Savage outside St. Mark's (Tr. 373-374). About a week earlier, Savage had told Perkins that he did not like Pastor Steele, that he was going to "pay her back" (Tr. 366-367), and, "jokingly," that he was going to burn her church down (Tr. 367). Upon meeting up with

Perkins on the evening of October 19, Savage told Perkins that he had spoken to Bishop Ashley and said that “you know what we have to do tonight” (Tr. 374). He directed Perkins to get a container for gasoline and to meet him at a convenience store known as the Nice-N-Easy (Tr. 374).

Perkins testified that he drove home, got a plastic container and drove to the Nice-N-Easy (Tr. 375-376). As he drove up to the gasoline pump, Henry Savage approached his car (Tr. 376). While Savage waited outside, Perkins went inside to pay for the gasoline, then pumped gas into the container (Tr. 377-378). Perkins handed Savage the container and they drove to Pastor Steele’s church, which was just a few minutes away (Tr. 379; see Tr. 164). When they arrived at the church, Joe Brown and Jimmy Jackson were already there (Tr. 379). Perkins pushed open the double doors of the church and he, Savage, and Brown went into the church while Jackson remained outside in a van parked on Fay Street across the street from the church (Tr. 382). Savage began pouring gasoline in front of the doors going into the sanctuary, then asked Perkins if he had any matches (Tr. 383-384). Brown went up the steps to the balcony, carrying the gasoline and a flashlight; he returned a few minutes later without the flashlight (Tr. 384-385).⁵ Perkins then decided he did not “want to have anything more to do with” the arson, and left the church (Tr. 385). As he reached his car, he heard “a swishing noise” as the church ignited

⁵ Investigators found a black flashlight on the steps leading to the balcony after the fire (Tr. 188).

(Tr. 386). He noticed that Jimmy Jackson was still in the van outside the church (Tr. 386-387).

Perkins's testimony was corroborated in significant respects by other evidence at trial. Pictures taken by a security camera at the Nice-N-Easy showed Perkins making a purchase just before midnight on the night of the fire (Tr. 198, 203, 216, 237-238, 326). A clerk who was working at the Nice-N-Easy that night testified that the purchase was for "three or four dollars" worth of gasoline, and recalled that another man was standing outside near the car (Tr. 238-242).

Denise Savage, Henry Savage's wife, testified that on the evening of October 19, 1997, defendant Joe Brown had visited her and her husband (Tr. 436). Brown told her that Pastor Steele's church "needs to be burned" and that he and another man were supposed to be paid to burn it (Tr. 436-437). That same evening, she and her husband stopped at Jimmy Jackson's house (Tr. 437-438). Jackson also expressed his anger at Pastor Steele (Tr. 438-439). According to Denise Savage, both Jackson and Brown were angry at Steele because Steele had said that they were homosexual (Tr. 439-442). Sometime between 10:00 and 11:00 that same night, Joe Brown came to the Savage's house; he and Henry Savage later left the house together and did not return (Tr. 443-446, 449).

Finally, both an inmate and a guard at a correctional facility testified that they heard Jimmy Jackson admit that he had participated in the arson of the Believers' Miracle

Deliverance Church. Roberta Lockhart testified that in November 1997, she was housed in the same dormitory as Jackson for one night while both were in custody in the Oneida County Correctional Facility (Tr. 250-252).⁶ Lockhart and Jackson discussed the fire at the Believers' Miracle Deliverance Church, which had been reported on television (Tr. 252). Jackson told Lockhart that "me and my man torched" the church, and had done so "because she had fucked so many people over" (Tr. 253). Mark Leaf, a corrections officer assigned to the unit housing both Jackson and Lockhart in November 1997, testified that he overheard this conversation between the two (Tr. 273-276). According to Leaf, Jackson said that he had gone to the church on Fay Street with several others and had set fire to the church, then stood with the crowd and watched it burn (Tr. 276-278). Leaf testified that Jackson seemed "angry" with the pastor of the church and referred to the pastor in derogatory terms (Tr. 278-280). Leaf reported the conversation to his sergeant (Tr. 277, 279).

SUMMARY OF ARGUMENT

The evidence presented at trial was sufficient to support Jackson's conviction for conspiracy. The evidence showed that Perkins, having been recruited by Bishop Ashley to burn the church, purchased gasoline and drove with Savage to the church on the night of the fire. Jackson and Brown were waiting at the church when Perkins and Savage

⁶ At the time of trial, Ms. Lockhart was undergoing gender reassignment. In November 1997, Lockhart was a male (Tr. 264-265).

arrived. Perkins, Savage, and Brown entered the church, where Savage and Brown poured gasoline and set the fire. Jackson remained outside the church, and was still waiting outside when Perkins left as the church ignited. Evidence also showed that Jackson was angry at Pastor Steele, and that he subsequently admitted that he went to the church with others and that “me and my man torched” the church. This evidence was sufficient to permit a rational jury to find that Jackson had agreed to participate in a collective venture with the common goal of burning the church.

ARGUMENT

THE EVIDENCE WAS SUFFICIENT TO SUPPORT DEFENDANT’S CONVICTION FOR CONSPIRACY

Defendant Jackson makes several arguments in support of his contention that his conviction should be reversed. Although articulated somewhat differently, each of these arguments amounts to nothing more than a claim that the evidence at trial was insufficient to support his conviction for conspiracy. As this Court recently explained, a defendant making such a contention faces a “heavy burden.” *United States v. McDermott*, 245 F.3d 133, 136 (2d Cir. 2001) (internal quotation marks and citations omitted). In reviewing sufficiency challenges, this Court “view[s] the evidence in the light most favorable to the government, drawing all inferences in the government’s favor. * * * An appellant must demonstrate that no rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt.” *Id.* at 137 (internal quotation marks and citations omitted). These principles are equally applicable to direct and circumstantial

evidence. *Ibid.* “[T]he task of choosing among competing, permissible inferences is for the fact-finder, not for the reviewing court.” *Ibid.*

As explained in detail below, defendant failed to meet this burden. The evidence at trial was more than sufficient to permit the jury to find him guilty of conspiracy to burn the Believer’s Miracle Deliverance Church.

The essential elements of conspiracy are well settled. The prosecution must prove: “(1) that the defendant agreed with at least one other person to commit an offense, (2) the defendant knowingly participated in the conspiracy with the specific intent to commit the offenses that were the objects of the conspiracy, and (3) that during the existence of the conspiracy, at least one of the overt acts set forth in the indictment was committed by one or more of the members of the conspiracy in furtherance of the objectives of the conspiracy.” *United States v. Salameh*, 152 F.3d 88, 145-146 (2d Cir. 1998), cert. denied, 525 U.S. 1112 (1999) (citations omitted). “[T]he essence of conspiracy is the agreement and not the commission of the substantive offense.” *McDermott*, 245 F.3d at 137 (internal quotations and citations omitted). The government must prove that “each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal. The coconspirators need not have agreed on the details of the conspiracy, so long as they agreed on the essential nature of the plan.” *Ibid.* (internal quotations and citations omitted). Proof of an agreement “does not require evidence of a formal or express agreement; it is enough that the parties have a tacit understanding to

carry out the prohibited conduct. * * * Both the existence of the conspiracy and the intent to commit the underlying substantive offenses may be proven by circumstantial evidence. *United States v. Rubin*, 844 F.2d 979, 984 (2d Cir. 1988) (citations and internal quotation marks omitted). Nor is it necessary to show that the accused knew “every detail of the scheme’s operation, or the identity of every coconspirator.” *United States v. Wiley*, 846 F.2d 150, 153-154 (2d Cir. 1988).

In this case, the evidence presented at trial established that Jackson, along with Joe Brown, was present outside the church when Perkins and Savage arrived with the container of gasoline, that Jackson waited outside the church while Perkins, Savage, and Brown went inside to set the fire, and that Jackson was still outside, in a van, when Perkins left as the church ignited. The evidence also established that Jackson later claimed responsibility for burning the church, stating that he had gone to the church with others and that “me and my man torched” the church. Finally, the evidence showed that Jackson had a motive: that he was angry at Pastor Steele, and that he had expressed his anger in the company of at least one of the co-conspirators (Henry Savage) within hours before the fire.

The jury could infer from this evidence that Jackson had agreed to participate in a “collective venture directed toward a common goal” of burning the church. *McDermott, supra*. The evidence at trial demonstrated more than Jackson’s mere presence at the scene at the time the fire was set. His subsequent statement in the jail that he had gone to

the church with others and that he had burned the church, indicated that he was not simply an innocent bystander, but rather a willing participant in the venture.

Defendant seeks to attack the jury's finding in several ways. First, he argues that there was no testimony that he was aware of the plan to burn the church or that his role was to act as a lookout (Def. Br. 3-6). As this Court has emphasized, however, the elements of a crime, including conspiracy, may be established entirely by circumstantial evidence, and it is the jury's province to choose among competing inferences from such evidence. *McDermott*, 245 F.3d at 139; *Rubin*, 844 F.2d at 984. Jackson's presence outside the church, before, during, and after the setting of the fire, together with his subsequent admission that he had participated in the arson along with at least one other (*i.e.*, "me and my man torched" the church), was sufficient evidence to permit the inference that he was a participant in the conspiracy and that he had acted as lookout.

Defendant next argues (Def. Br. 6-8) that his statement that he had set the fire and watched it burn was inconsistent with the government's theory of the case. To be sure, Leaf and Lockhart testified that Jackson claimed to have set the fire, while Perkins testified that Jackson had remained outside the church while the others went inside to set the fire. But any discrepancies between the different witness's accounts do not undermine the jury's verdict. Jackson may have exaggerated his role in the arson when he told his story to Lockhart, engaging in what his own lawyer described as "jail house boasting" (Tr. 507). But such an overstatement cannot preclude the jury's otherwise

reasonable inference that he was in on the agreement to burn the church, one way or the other. Leaf's and Lockhart's testimony that Jackson had subsequently admitted his participation in the burning of the church allowed the jury to infer that he was a willing participant in the common venture to burn the church, even if Jackson had claimed for himself a more active role in the conspiracy than he actually played.⁷

Defendant next argues (Def. Br. 8-10), that his admission that he had participated in the arson does not support the jury's verdict that he was guilty of conspiracy. Because Perkins did not know why Jackson was present at the church, and because there was no direct evidence that Jackson had discussed the details of the conspiracy with anyone, he contends, the evidence was insufficient to establish the elements of conspiracy. This argument, however, misapprehends the basic principles of conspiracy. As explained above, proof of an agreement "does not require evidence of a formal or express

⁷ In any event, defendant's brief overstates the inconsistencies in the evidence. When Perkins arrived at the church, Jackson and Brown were already there. And when Perkins left, Jackson was still outside. There was no evidence at trial to preclude the possibility that Jackson entered the church when Perkins was not present. Nor was there any necessary inconsistency between Perkins's account and Leaf's testimony that Jackson said he watched the church burn (see Def. Br. 7). Perkins testified that he heard the "swish" of the church igniting within a few seconds after leaving the inside of the church and that Jackson was still present at that time (Tr. 386-387). Leaf did not say how long Jackson said he had stayed outside the church (Tr. 289-290). Jackson's statement that he watched the church burn is consistent with the inference that he, Brown, and Savage left soon after the fire ignited. Finally, contrary to Jackson's representation (Def. Br. 6), Leaf did *not* testify that Jackson said he had *not* been the lookout. According to Leaf, Jackson said only that "[h]e set the fire and watched it burn" (Tr. 297). Leaf specifically denied hearing Jackson say whether or not he had acted as lookout, or, for that matter, whether he claimed to have poured the gasoline or lit the match that started the fire (Tr. 297).

agreement; it is enough that the parties have a tacit understanding to carry out the prohibited conduct. * * * Both the existence of the conspiracy and the intent to commit the underlying substantive offenses may be proven by circumstantial evidence.” *Rubin*, 844 F.2d at 984. Nor is it necessary to show that the accused knew “every detail of the scheme’s operation, or the identity of every coconspirator.” *Wiley*, 846 F.2d at 153-154. Thus, it was not necessary for the government to present any evidence of discussions Jackson might have had with his co-conspirators concerning the plan to burn the church. Nor did it matter that Perkins was unaware of Jackson’s involvement in the conspiracy or his role at the church. The jury could infer that Jackson had joined in “a tacit understanding to carry out” the arson (*Rubin, supra*) from the evidence that he waited outside the church while the others went inside to set it afire, together with his subsequent statement that “me and my man torched” the church. Contrary to defendant’s contention (Def. Br. 9), his jailhouse statements are evidence of his knowing participation in the conspiracy. His statements that he went to the church in the company of others and that “me and my man torched” the church evidenced his specific intent to commit the underlying crime and his agreement to participate in the common venture.

Finally, relying on *United States v. McDermott*, defendant contends (Def. Br. 11-12), that a variance between the indictment and the evidence presented at trial unfairly prejudiced him and deprived him of a fair trial. The circumstances of this case, however, are fundamentally different from those in *McDermott*. In this case, there was no variance

between the indictment and the evidence at trial, and Jackson was not prejudiced or denied a fair trial.

McDermott involved allegations of conspiracy and insider trading among the president of an investment bank (McDermott), a pornographic film star (Gannon) and another businessman (Pomponio). 245 F.3d at 135-136. McDermott provided non-public investment information, in violation of 15 U.S.C. 78j(b) and 78ff, to Gannon, with whom he was having an extramarital affair. *Id.* at 135. Without McDermott's knowledge, Gannon was conveying this information to Pomponio. Both Gannon and Pomponio made substantial profits trading stocks based upon the information. *Id.* at 135; see *id.* at 138-139.

This Court found the evidence sufficient to support McDermott's conviction for insider trading, based upon the information he provided to Gannon. 245 F.3d at 138-139. But it reversed McDermott's conspiracy conviction, relying on the principle that "[n]obody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it." *Id.* at 137. Because McDermott could not have anticipated that Gannon would share the information with Pomponio, or even that Pomponio existed, this Court held, "[t]he government has failed to show the most basic element of a single conspiracy, namely, an agreement to

pass insider information to Gannon and possibly to another person, even if unknown.” *Id.* at 138.

McDermott then concluded that the variance between the single conspiracy charged and the evidence at trial caused the defendant “substantial prejudice at trial,” because there had been “prejudicial spillover” due to his joinder with Pomponio. 245 F.3d at 139. Pomponio was also charged with perjury and this charge was the subject of what the Court described as the “sensational highlight of the government’s evidence,” tape recordings of deposition testimony that “undermined Pomponio’s defense and credibility, as they recorded him poorly telling lies, evading questions and affecting incredulous reactions.” *Id.* at 136. “Given that Pomponio and McDermott were on trial for conspiring to commit insider trading, that there was a large disparity between the government’s case against Pomponio for perjury and its case against McDermott, that Pomponio could only be guilty on the substantive insider trading counts if McDermott also were guilty, and that McDermott conceded having given some public information to Gannon, the potential for spillover was substantial.” *Id.* at 139. Based upon this prejudice and evidentiary errors by the district court, this Court reversed McDermott’s conviction on the substantive insider trading count. *Id.* at 140-142.

In this case, there was no prejudicial variance between the indictment and the evidence at trial. The indictment alleged that Jackson waited outside the church, acting as a lookout, while the others went inside and set the fire. Perkins’s testimony was fully

consistent with this allegation. Leaf's and Lockhart's testimony that Jackson subsequently claimed to have set the fire is not the kind of discrepancy that caused him any prejudice. Unlike in *McDermott*, there was no failure of proof on the conspiracy count. If Jackson's jailhouse claims were accurate, then his involvement in the conspiracy may have been *more*, not less, substantial than was charged in the indictment. As explained above, the evidence was clearly sufficient to permit a rational jury to find that Jackson had participated in the conspiracy to burn the church.

CONCLUSION

The defendant's conviction should be affirmed.

Respectfully submitted,

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